Supreme Court, U.S.
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No. 09-1474

IN THE

Supreme Court of the United States

JAMES DICKEY,
Petitioner,

v.

INSPECTIONAL SERVICE DEPARTMENT
OF THE CITY OF BOSTON,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the United States District Court for the District of Massachusetts accurately find, as a matter of law, that The City of Boston, Inspectional Services Department, is entitled to summary judgment?

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OPINIONS BELOW

The one page judgment of the United States Court of Appeals for the First Circuit that is the subject of this proceeding is unreported and is found in Appendix A to The Petition For Writ Of Certiorari (hereinafter "App. A.") at page 1a. The order of the United States District Court for the District of Massachusetts is unreported and is found in Appendix B to The Petition For Writ Of Certiorari (hereinafter "App. B.") at pages 2a-28a.

STATEMENT OF THE CASE

A. The Condemnation of Petitioner's Property.

James Dickey ("Petitioner") is the owner of property located at 495-497 East Fourth Street, South Boston, Massachusetts (the "Property"). The dwelling is unoccupied and Petitioner resides elsewhere. NSTAR Gas & Electric ("NSTAR") attempted to access the gas meter located on the Property on prior occasions and it was unsuccessful because the Property was abandoned and locked. NSTAR left notices for the customer that it required access to the gas meter. Based upon its failed attempts, NSTAR sought and obtained an administrative search warrant from the Boston Municipal Court, South Boston Division to inspect and remove the meter from the Property. Pursuant to the warrant, NSTAR, with a Boston Police Department officer, entered the premises in order to terminate service. The Boston Police officer contacted Boston Inspectional Service Department ("ISD") to render a decision on the Property because

of the deplorable conditions of the dwelling. Based upon the conditions of the dwelling, which included numerous stray animals, exposed electrical wires, debris, the lack of electricity, and containers of flammable liquids, ISD issued a Notice for the Condemnation hearing for the Property, pursuant to 105 C.M.R. 410.831 which was posted at the address. An administrative hearing was held on June 3, 2008. ISD entered a finding that the dwelling was unfit for human habitation and a danger to the public and condemned the building. Petitioner, as the owner of the Property, was not present at the hearing, although he was provided statutory notice which was posted on the Property and he had the opportunity to offer evidence.

On June 20, 2008, Petitioner filed a Complaint and Temporary Restraining Order in Suffolk Superior Court. The Trial Court, after written and oral arguments, issued an order on July 2, 2008, allowing Petitioner access to the Property Monday through Friday between the hours of 9:00 a.m. and 5:00 p.m. upon one hour's telephone notice to ISD. Under the Order, ISD was not allowed to enter the Property without twenty-four hour written notice to Petitioner. Pursuant to the Suffolk Superior Court Order, Petitioner requested and gained entrance to the Property on four separate occasions.

B. The District Court Proceedings.

Petitioner filed his complaint in the United States District Court on September 15, 2008, alleging civil rights violations pursuant to 42 U.S.C. § 1983 stemming from the condemnation finding on his Property, and requesting a preliminary

injunction against ISD. ISD filed its opposition to the preliminary injunction on September 17, 2008. United States District Court Judge Patti B. Saris held a hearing on September 18, 2008. The Court ordered that the parties file a stipulation addressing Petitioner's access to the Property and dismissal of the complaint. The parties were unable to come to an agreement. The Court referred the matter to Alternative Dispute Resolution and a mediation hearing was held before United States Magistrate Judge Marianne B. Bowler. The parties entered a stipulation allowing Petitioner's access to the Property on November 25, 2008.

On October 20, 2008, Petitioner filed an Opposition to Dismissal of his Complaint. The Court referred the opposition to United States Chief Magistrate Judge Judith G. Dein. Petitioner subsequently filed a motion for a temporary restraining order, which was also referred to Chief Magistrate Judge Judith G. Dein. On November 28, 2008, Petitioner withdrew his motion for a temporary restraining order. Chief Magistrate Judge Dein held a hearing on the motions on December 1, 2008. On December 16, 2008, the Court denied Petitioner's motion for a preliminary injunction. ISD's Motion for Dismissal and Petitioner's Opposition to Dismissal were denied as moot.

On January 15, 2009, Petitioner filed a motion for summary judgment. ISD filed a cross motion for summary judgment on March 5, 2009. Chief Magistrate Judge Dein held a summary judgment hearing on April 2, 2009. On July 7, 2009, Chief Magistrate Judge Dein filed her report and recommendations denying Petitioner's motion for summary judgment and allowing ISD's motion. On

July 20, 2009, Petitioner filed his objection to the Magistrate's report and recommendation. On July 30, 2009, United States District Judge Saris adopted the recommendations of the Magistrate Judge and ordered final judgment in favor of ISD.

C. The Petitioner's Appeal.

On August 24, 2009, Petitioner filed a notice of appeal with the Court of Appeals for the First Circuit. After written filing from both parties, the First Circuit upheld the District Court's order of Summary Judgment in March 2010.

SUMMARY OF THE ARGUMENT

The District Court correctly granted summary judgment in favor of the City of Boston. In order to find liability under a 42 U.S.C. § 1983 claim against a City, two basic elements are required: (1) that plaintiff's harm was caused by a constitutional violation, and (2) that the City was responsible for that violation. Young v. City of Providence, 404 F.3d 4, 25-26 (1st Cir.2005). Here, the City of Boston was entitled to summary judgment as a matter of law as there was no violation of Petitioner's constitutional rights. Without any constitutional violation, Petitioner cannot satisfy that necessary element of his § 1983 claim and summary judgment in favor of the City of Boston was appropriate. Accordingly, this Court should affirm the judgment of the First Circuit.

ARGUMENT

I. THE CITY WAS ENTITLED TO SUMMARY JUDGMENT BECAUSE PETITIONER WAS NOT DEPRIVED OF ANY CONSTITUTIONAL RIGHT.

As a matter of law, the City of Boston was entitled to summary judgment as Petitioner was not deprived of any constitutional right. Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). Furthermore, "the presence of cross-motions for summary judgment neither dilutes nor distorts this standard of review." Mandel v. Boston Phoenix Inc., 456 F.3d 198, 205 (1st Cir. 2006) (citation omitted). Rather, cross-motions require a court to determine "whether either of the parties deserves judgment as a matter of law on facts that are not disputed." Adria Int'l Group, Inc. v. Ferre Dev., Inc., 241 F.3d 103, 107 (1st Cir. 2001).

A 42 U.S.C. § 1983 claim can be brought against a municipality as they are "persons" within the meaning of the statute. Monell v. New York City Department of Social Services, 436 U.S. 658 (1978). Proper analysis of a § 1983 claim against a municipality requires the separation of two different issues: (1) whether the alleged harm was caused by a constitutional violation; and, (2) if so, whether the municipality is responsible for that violation. Collins v. City of Harker Heights, 503 U.S. 115, 120 (1992). For liability to attach to the City under a § 1983 claim, the plaintiff must show that his injuries were

inflicted as a result of an official custom or policy of the City. Monell, 436 U.S. at 658. Municipalities are not, however, subject to respondeat superior liability claims under § 1983. Id. at 691-92.

In the instant case, the District Court determined that, as a matter of law, ISD was entitled to summary judgment because the undisputed facts established that Petitioner was not deprived of any constitutional right. The obvious hazardous condition of the Property, outlined in ISD's condemnation report, clearly demonstrates that ISD's actions were based on the need for public safety. Even if ISD's actions amounted to a seizure, such actions were reasonable and thus did not constitute a Fourth Amendment violation. Additionally, Petitioner was provided with adequate due process and, as such, Petitioner's Fourteenth Amendment argument fails. As there was no violation of Petitioner's constitutional rights, summary judgment in favor of the City of Boston was appropriate.

A. The City's Condemnation Of Petitioner's Property Was Not A Fourth Amendment Violation As It Did Not Constitute An Unreasonable Seizure.

There was no violation of Petitioner's Fourth Amendment Rights as ISD's actions were reasonable. The Fourth Amendment of the United States Constitution protects the people to "be secure in their persons, houses, papers, and effects, against unreasonable searches and seizure." United States Constitution Amend. IV. The Fourth Amendment is

made applicable to the states by the Fourteenth Amendment. Air Pollution Variance Board v. Western Alfalfa Corp., 416 U.S. 861 (1974). In looking at the Fourth Amendment, it has been long held that "the touchstone of the Fourth Amendment is reasonableness." Ohio v. Robinette, 519 U.S. 33, 39 (1996) (emphasis added). Whether a search and seizure is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances of each case. Cady v. Dombrowski, 413 U.S. 433 (1973). In addition, the reasonableness standard is one that reflects a "careful balancing of governmental and private interests." Soldal v. Cook County, 506 U.S. 56, 71 (1992), (quoting New Jersey v. T.L.O., 469 U.S. 325, 341 (1985)). Further, this Court has held that a seizure of property occurs "when there is some meaningful interference with an individual's possessory interests in that property." United States v. Jacobsen, 466 U.S. 109, 113 (1984) (citation omitted).

In determining reasonableness, there must be a careful balancing of governmental and private interests. Soldal, 506 U.S. at 71. Courts have recognized that local governments have an interest in protecting the public and that seizing a building may well fall within that purview. Gariffo Real Estate Holdings Co., Inc. v. City of Philadelphia, CA No. 05-6153, 2007 WL 1410607, at 5 (E.D. Pa. May 11, 2007) ("the City has a strong interest in ensuring that structures located within City bounds do not pose a threat to the safety of the general public"); Smith v. City of Boston, 2004 WL 1572626 at 4 (D.Mass. July 13, 2004) ("Where a building is seized because of the danger it poses and adequate recourse is provided to challenge any action taken by the local

government, the seizure does not violate the Fourth Amendment.").

States possess the power – and municipalities, under legislative sanction, may exercise the power – to "prescribe such regulations as may be reasonable, necessary, and appropriate for the protection of the public health and comfort." California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306, 318 (1905). Under Massachusetts' Department of Health State Sanitary Code, ISD inspectors have the authority to issue a written finding that a dwelling or portion thereof is unfit for human habitation. 105 C.M.R. 410.831(a). Such a finding must include a statement of the material facts and conditions on which the finding is based. Id. In addition, if such a finding is made, ISD can issue an order condemning the dwelling and requiring the owner to secure the property. 105 C.M.R. 410.831(c). If the property which is to be secured is unoccupied, then the owner or any other affected person has the right to a hearing. Id. After a condemnation hearing, a notice of decision shall be entered as a matter of public record. 105 CMR 410.855.

In the present case, while ISD's actions likely constituted a seizure, the seizure was reasonable. The District Court found that the undisputed facts clearly demonstrated the Property was in deplorable condition and therefore uninhabitable. App. B at 21a. The situation was so severe that, when a police officer on the scene saw the condition of the Property, he called 1) the patrol supervisor, 2) an ISD inspector, and 3) animal control. Id. In the building, there was debris and trash throughout, feces, stray cats, exposed electrical wiring, and flammable liquids. Id. at 8a. Entire sections of walls

and ceilings were missing and avenues of egress were obstructed. Id. In short, ISD's actions in declaring an emergency and boarding up Petitioner's Property were entirely reasonable based on the condition of the property.

Further, Petitioner was not denied access to the Property in order to clean it up. Id. at 23a. The emergency order posted at the Property and the Hearing Officer's Notice of Decision clearly indicated Petitioner was to perform work on the Property in order to bring it in compliance with the Sanitary Code. Id. Indeed, it is the City's best interest to have such conditions corrected as quickly as possible. ISD also entered into an agreement with Petitioner whereby Petitioner could access the Property on weekdays and ISD was willing to work with Petitioner to cure the violations. Id. at 24a.

Ultimately, the City had a strong interest in this case in protecting the general public. ISD's actions in issuing an emergency order and boarding up the Property were reasonable under the circumstances. ISD also allowed Petitioner access to the Property to cure the violations. Since the City acted reasonably in its seizure of Petitioner's Property, there was no Fourth Amendment violation and thus summary judgment in favor of the City was appropriate.

B. The City Did Not Violate Petitioner's Procedural Due Process Rights Under The Fourteenth Amendment. Rather, The City Afforded Petitioner With An Adequate Means Of Redress.

The City of Boston was entitled to summary judgment as Petitioner's procedural due process rights were not violated. The Fourteenth Amendment provides, in part, that "no state [shall] deprive any person of life, liberty, or property without the due process of law...." U.S. Const. Amend. XIV, § 1. Due process is a flexible conception and "calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (citation omitted). Generally speaking, due process requires "some kind of hearing" before an owner is deprived of his property interest. Memphis Light, Gas and Water Div. v. Craft, 436 U.S. 1, 19 (1978). However, a hearing is not always required prior to a final deprivation of property. "[W]here a State must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause." Gilbert v. Homar, 520 U.S. 924, 930 (1997) (emphasis added). Additionally, due process does not require that a property owner "receive actual notice before the government may take his property." Jones v. Flowers, 547 U.S. 220, 225 (2006). Here, the undisputed facts show that Petitioner was afforded with adequate means of

redress. App. B at 24a. Thus, summary judgment in favor of the City of Boston was appropriate.

Where there is an emergency, the government is relieved of its usual obligation to provide a hearing, as long as there is an adequate procedure in place to assess the propriety of the deprivation afterwards. In Herwins v. City of Revere, the City of Revere, after finding a building unfit for human habitation, issued an emergency order and ordered the building vacated. Herwins v. City of Revere, 163 F.3d 15, 18 (1st Cir. 1998). The Herwins Court noted that the opportunity for a hearing should be pre-deprivation but that it is not always feasible. Id. Even though the City of Revere did not offer a hearing to the owner before ordering the building vacated, the court found there was adequate due process protection as the owner was afforded the opportunity to challenge the deprivation afterwards. Id.

The undisputed facts showed Petitioner's Fourteenth Amendment rights were not violated and Petitioner was provided with an adequate means of redress. Under Gilbert, if a state must act quickly, postdeprivation process can substitute for providing a hearing prior to the final deprivation of property. Gilbert, 520 U.S. at 924. The City of Boston did precisely that. As the buildings were in deplorable conditions and a danger to the public, ISD determined it had to move quickly and shut the buildings down. App. B at 22a. Further, when ISD seized Petitioner's Property on an emergency basis, it "provided him with notice of a condemnation hearing by posting an order at the Property that contained the date, time and place of the hearing." (App. B at 25a). The hearing was held on the

scheduled date and Petitioner failed to appear. Id. at 8a. Petitioner also had an opportunity to appeal the Hearing Officer's decision in court. Id. at 25a.

Curiously, Petitioner attempts to create a distinction between the condemnation and the seizure of his Property as it pertains to his procedural due process rights. The Petition For Writ Of Certiorari, pg. 23. The District Court, however, rejected this argument, as ISD's actions in boarding up and assuming control over the Property "occurred as part of the condemnation process." App. B at 26a. This statement by the District Court is supported by the record. ISD boarded up the Property because of emergency conditions and numerous violations of the Sanitary Code. Id. at 8a. In upholding the condemnation, the Hearing Officer noted that the Property would remain secured and locked until the Sanitary Code violations were corrected by the owner. Id. at 9a. Thus, the condemnation decision and the seizure and control of the Property were part of the same process. As Petitioner was afforded an opportunity to be heard, his distinction is moot. Since there was no violation of Petitioner's procedural due process rights, Petitioner fails to make out this necessary element of his § 1983 claim and summary judgment in favor of the City of Boston was appropriate.

CONCLUSION

For the foregoing reasons, the First Circuit's judgment should be affirmed in favor of the City of Boston.

Respectfully submitted,

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Dated: July 6, 2010